SUPREME COURT OF THE UNITED STATES.

No. 307.

FREDERICK PRENTICE, IMPLEADED WITH WILLIAM H. WHITE, PLAINTIFFS IN ERROR,

vs.

WILLIAM PICKERSGILL, JR., FOR THE USE OF LEVI WADE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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1 Among the rolls, records, and judicial proceedings of the circuit court of the United States for the western district of Pennsylvania, at Pittsburg, in the third circuit, may be found the following words and figures, viz:

Summons in covenant issued December 13th, 1864, returnable to the first Monday of January, 1865.

WILLIAM H. PICKERSGILL, Jr. for the use of Levi Wade, citizens of the State of Pennsylvania,
vs.
FREDERICK PRENTICE, a citizen of the State of New York, and Wm. H. White, a citizen of the State of Michigan.

Be it remembered, that heretofore, to wit, Dec'r 13, 1864, comes the plaintiffs, by their counsel, and files the following precipe:

Copy of precipe.

In the circuit court of the United States, western district of Penna.

WILLIAM PICKERSGILL, Jr., for the use of Levi Wade, citizen of the State of Penna.,
vs.
FREDERICK PRENTICE, a citizen of the State of New York, and Wm. H. White, a citizen of the State of Michigan.
} No. 9 of May term, 1865.

Issue summons in covenant, returnable next return day.

HAMILTON & ACHESON, *Pl'ffs Att'ys.*

To H. SPROUL, Esq., *Clerk.*

December 13, 1864.

Whereupon the following summons issued:

2 UNITED STATES, *Western district of Pennsylvania, sct:*

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you that you summon Frederick Prentice, a citizen of the State of New York, and William H. White, a citizen of the State of Michigan, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court, to be holden at Pittsburg, on the first Monday of January (1865) next, to answer to William Pickersgill, jr., for the use of Levi Wade, citizen of the State of Pennsylvania, in an action of covenant; and have you then there this writ.

Witness the honorable Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, at Pittsburg, this thirteenth

day of December, A. D. 1865, and in the 89th year of the independence of the said United States.

H. SPROUL, *Clerk.*

3 And afterwards, to wit, January 30, summons returned not served. So answers.

A. MURDOCH, *Marsh'l.*

And afterwards, to wit, February 1st, 1865, comes the plaintiff, by his attorneys, and files the following precipe:

In the circuit court of the United States for the western district of Pennsylv'a.

WILLIAM PICKERSGILL, Jr., for the use of Levi Wade, citizens of the State of Pennsylvania, *vs.* FREDERICK PRENTICE, a citizen of the State of New York, and Wm. H. White, a citizen of the State of Michigan.	No. 9 of May term, 1865.

Issue alias summons in covenant, returnable to the first Monday of March next.

HAMILTON & ACHESON, *Attorneys for Pl'ff.*

To H. SPROUL, *Clerk C. court U. S., West. Dist. of Pa.*

February 1, 1865.

Whereupon, the following alias summons was issued:

4 UNITED STATES, *Western district of Pennsylvania, sct:*

The President of the United States to the marshal of the western district of Pennsylvania, greeting:

We command you as we have heretore done, that you summon Frederick Prentice, a citizen of the State of New York, and William H. White, a citizen of the State of Michigan, late of your district, if they may be found therein, so that they be and appear before the judges of the circuit court of the United States in and for the western district of Pennsylvania, in the third circuit, at a session of the same court to be holden at Pittsburg on the first Monday of March next, to answer to William Pickersgill, jr., for the use of Levi Wade, citizens of the State of Pennsylvania, in an action of covenant; and have you then there this writ.

Witness the honorable Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, at Pittsburg, this first day of February, A. D. 1865, and in the 89th year of the independence of the said United States.

H. SPROUL, *Clerk.*

5 Indorsement upon this writ: February 6th, 1865, served the within writ personally on Frederick Prentice, by reading writ to him and giving a true and attested copy of same, and nihil as to W. H. White.

So ans.

SAM'L A. THOMAS,
Dept. U. S. Marshal.

Venango County, ss:

Before me, a justice of the peace in and for said county, personally came the abovenamed Samuel A. Thomas, who being duly sworn according to law, says that the above return is just and true.

Sworn and subscribed before me this 6th day of February, A. D. 1865.

F. BURRENE, *J. P.*

I hereby depute and authorize Samuel A. Thomas to serve this writ.

A. MURDOCH,
U. S. Marshal.

February 1st, 1865.

And afterwards, to wit, March 17th, 1865, comes the plaintiff, by his attorneys, and files the following declaration:

Copy of Declaration.

6 In the circuit court of the United States, western district of Pennsylvania.

WILLIAM PICKERSGILL, Jr., for the use of Levi Wade, citizens of the State of Pennsylvania, *vs.* FREDERICK PRENTICE, a citizen of the State of New York, and William H. White, a citizen of the State of Michigan.	No. 9, May term, 1865.

Frederick Prentice, a citizen of the State of New York, and William H. White, a citizen of the State of Michigan, were summoned to answer William Pickersgill, jr., who sues for the use of Levi Wade, citizens of the State of Pennsylvania, of a plea of covenant; and thereupon the plaintiff complains—

For that whereas heretofore, to wit, on the 27th day of September, A. D. 1858, at Pittsburg, in the district aforesaid, the said plaintiff, (William Pickersgill, jr.,) purchased from the defendant, (Frederick Prentice,) a certain tract of land, situate in Lake township, Wood county, and State of Ohio, for the sum of thirty-two hundred dollars, which the plaintiff then and there paid to the defendant, (Frederick Prentice;) and thereupon on the day and year aforesaid, at the district aforesaid, the said Frederick Prentice and said Wm. H. White did sign, seal, and deliver unto the plaintiff a cer-
7 tain instrument of writing, of the tenor following, to wit:

Whereas William Pickersgill, jr., has purchased from Frederick Prentice the northeast quarter of section twenty-one (21) in Lake township, Wood county, and State of Ohio, containing one hundred and sixty acres (160) of land; and whereas the said Pickersgill has paid to the said Prentice the sum of three thousand two hundred dollars for the said land in fee simple; and whereas there is a mortgage of five thousand dollars or thereabouts unpaid against the lands of which this is a portion; and whereas the intention of said Prentice was to give to said Pickersgill a full, clear, and perfect title to said one hundred and sixty acres of land; and whereas William H. White, of the city of Pittsburg, county of Allegheny, and State of Pennsylvania, urged the said Pickersgill to purchase the said land at the aforesaid price, and said White would, with said Prentice, bind himself and agree to sign a paper guaranteeing a perfect and clear title to the said Pickersgill of the said lands: Now this agreement witnesseth: that for and in consideration of the sum of one dollar in hand paid to us by the said Pickersgill, the receipt whereof we do hereby acknowledge, we do bind ourselves, agree and guarantee to the said Pickersgill that the mortgage aforesaid shall be fully paid off within eighteen months from this date, and that the prop-
8 erty shall not be sold upon the said mortgage, nor upon any judgment obtained thereon, nor upon any lien given or to be given by the said Prentice, but that the said Pickersgill shall have a full, clear, and perfect title in fee simple to the said lands; to the full performance of which we bind ourselves to said Pickersgill in the sum of three thousand two hundred dollars as liquidated damages.

Witness our hands and seals this 27th day of September, A. D. 1858.

F. PRENTICE. [SEAL.]
WM. H. WHITE. [SEAL.]

Witness: J. B. SACKETT.

(Which said instrument of writing, signed and sealed by the said defendants, Frederick Prentice and William H. White, the plaintiff now brings into court here.)

And the plaintiff saith that the mortgage in the above-recited instrument of writing mentioned was not paid off within eighteen months from the date of said instrument; but to the contrary thereof that judgment was obtained thereon, and afterwards, to wit, on the fourth day of June, A. D. 1860, at Wood county, in the State of Ohio, to wit, the district aforesaid, the said land mentioned in said in-
9 strument of writing and purchased by said William Pickersgill, jr., from said Frederick Prentice as aforesaid, was sold upon the said judgment obtained on said mortgage, and the title of him, the said plaintiff, to said land thereby failed and was defeated. Nevertheless the defendants did not nor would pay the plaintiff the said sum of $3,200 stipulated to be paid as liquidated damages as aforesaid, and so the pl'ff in fact saith that the said defendants have not kept their covenant in said instrument of writing contained, but have broken the same, and to keep the same with the plaintiff or to

pay him the said sum of $3,200 have wholly neglected and refused, and still doth refuse, to the damage of the plaintiff $5,000; and thereupon he brings his suit, &c.

HAMILTON & ACHESON,
Pl'ff's Attorneys.

And afterwards, to wit, March 21st, 1865, on motion of defendants' attorneys, leave is granted to them to withdraw their general appearance for defendants, and to enter their appearance specially for Frederick Prentice, on whom process had been served, with leave to plaintiff's attorneys to amend their declaration accordingly.

10 And afterwards, to wit, April 15th, 1865, comes the defendant, by his attorneys, and files the following pleas:

Copy of pleas.

Circuit court United States, western dist. of Penna.

FREDERICK PRENTICE, a citizen of the State of New York, impleaded with William H. White, a citizen of the State of Michigan,
ads.
WILLIAM PICKERSGILL, Jr., who sues to the use of Levi Wade, citizens of the State of Pennsylvania.
} No. 9 of May term, 1865.

1. And the said Frederick Prentice, by Loomis and Woodward, his attorneys, comes and defends the wrong and injury, when, &c., and says that the said supposed writing obligatory in the plaintiff's declaration mentioned is not the deed of the said Frederick Prentice and Wm. H. White; and of this he, the said Prentice, puts himself upon the country.

2. And for further plea in this behalf the said Prentice says that the said supposed writing obligatory in the plaintiff's declaration mentioned is not the deed of him, the said Frederick Prentice; and of this he puts himself upon the country.

11 3. And for further plea in this behalf the said Prentice saith that the aforesaid plaintiff ought to have or maintain his aforesaid action thereof against him, the said Prentice, because he saith that the said Prentice and the said William H. White have kept their covenant in said instrument of writing in the plaintiff's declaration contained; and this the said Prentice is ready to verify. Wherefore he prays judgment, &c.

4. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought ought not to have or maintain his aforesaid action thereof against him, because he saith that the said mortgage mentioned in said writing obligatory in the plaintiff's declaration described, was paid off within eighteen months from the date of said writing obligatory; and of this the said Prentice puts himself upon the country.

5. And for further plea in this behalf the said Prentice, defendant,

saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said mortgage mentioned in said writing obligatory in the plaintiff's declaration described, was paid off within eighteen months from the date of said writing obligatory; and this said Prentice is ready to verify. Wherefore he prays judgment, &c.

12 6. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought to have or maintain his aforesaid action against him, because he saith that judgment was not obtained on said mortgage in said plaintiff's declaration mentioned, in manner and form as in said plaintiff's declaration alleged; and of this the said Prentice, defendant, puts himself upon the country.

7. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action against him, because he saith that said land purchased by said William Pickersgill, jr., from said Frederick Prentice was not sold upon a judgment obtained on said alleged mortgage, in manner and form as alleged in the plaintiff's declaration; and of this the said Prentice puts himself upon the country.

8. And for further plea in this behalf the said Prentice, def't, saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the title of him, the said plaintiff, to said land in the plaintiff's declaration mentioned, did not fail and was not defeated in manner and form as plaintiff has, in his declaration, complained; and of this the said Prentice puts himself upon the country.

13 9. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said Prentice, defendant, heretofore, to wit, on the fourth day of June, eighteen hundred and sixty, paid to the said plaintiff the said sum of three thousand two hundred dollars in the said plaintiff's declaration mentioned; and this he is ready to verify. Wherefore he prays judg't, &c.

10. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that after the making of the said writing obligatory and undertakings in the pl'ff's declaration mentioned, and before the commencement of this suit, to wit, on the first day of January, eighteen hundred and sixty-five, at the district aforesaid, he, the said Frederick Prentice, paid and delivered to the said plaintiff a large sum, to wit, the sum of one thousand five hundred dollars, in full satisfaction and discharge of the said covenants and undertakings in the said declaration mentioned, and which said sum of one thousand five hundred dollars, he, the said plaintiff, then and there accepted and received of and from the said Prentice, in full satisfaction and discharge of the said several covenants and undertakings in the said declaration mentioned; and this he, the said Prentice, is ready to verify. Wherefore he prays judg't, &c.

14 11. And for further plea in this behalf the said Prentice, defendant, saith that the aforesaid plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said Prentice having paid the said plaintiff one thousand five hundred dollars, at sundry times, as he claimed and supposed and understood, in full satisfaction and discharge of the said several covenants and undertakings in the said pl'ff's declaration mentioned, a dispute and controversy arose between the said Prentice and the said pl'ff whether anything more was due or coming from the said Prentice, defendant, to the said plaintiff, for or by reason of the covenants and undertakings in the said declaration mentioned, and it was mutually agreed between the said Prentice and the said plaintiff, to wit, on the first day of Jan'y, 1864, to wit, at the district aforesaid, that they would leave it to William Henry, the partner of the said Pickersgill, plaintiff, to say and decide how much, if anything, should be paid by the said Prentice to the said plaintiff, in full satisfaction and discharge of the covenants and undertakings aforesaid; and that the said William Henry, in pursuance of such agreement, did then and there, to wit, on the day and year last aforesaid, and at the district aforesaid, say and decide that the said Prentice should pay to the said plaintiff, fifteen hundred more, in satisfaction
15 and discharge of said covenants and undertakings; which said sum of fifteen hundred dollars *which said sum of fifteen hundred dollars* he, the said Prentice, then and there, on the day and year last aforesaid, and at the district aforesaid, offered to pay to the said plaintiff, in satisfaction and discharge of the said covenants and undertakings, which the said William Henry so decided, as aforesaid, should be paid by the said Prentice to said plaintiff; and of this the said Prentice is ready to verify. Wherefore he prays judg't, &c.

LOOMIS & WOODWARD,
Attorneys for Frederick Prentice, Defendant.

And afterwards, to wit, April 27th, 1865, comes the plaintiff, by his attorneys, and files the following replication:

Copy of replication.

WILLIAM PICKERSGILL, Jr.,
vs.
FREDERICK PRENTICE, impleaded with Wm. H. White.

And the said plaintiff, as to the first, second, third, fourth, sixth, seventh, eighth, and ninth pleas of the defendants, whereof
16 he hath put himself upon the country, doth the like.

And the said plaintiff, as to the said plea of the said defendant (fifth plea) above pleaded, saith that the said plaintiff, by reason of anything in the said plea alleged, ought not to be barred from having and maintaining his aforesaid action, because he saith the said mortgage was not paid off or the lien thereof discharged of and from said premises within eighteen months from the date of said agreement; and of this the said pl'ff puts himself upon the country.

And the said pl'ff, as to the plea of the said defendant (tenth plea) above pleaded, saith the said defendant did not pay to the said pl'ff, and the said pl'ff did not receive from the said defendant, fifteen hundred dollars, or any sum of money, in satisfaction of said claim; and of this the said pl'ff puts himself upon the country.

And the said pl'ff, as to the plea of the said defendant (eleventh plea) above pleaded, saith that the matters in controversy between the said pl'ff and defendant in the said action, were not referred or submitted to the determination or decision of the said Wm. Henry, and the said William Henry did not make an award or decision in relation thereto, and that the said defendant did not pay to the said plaintiff the sum of fifteen hundred dollars, or any sum of money for or on account of any award or determination made or declared by the said William Henry; and of this he puts himself upon the country.

17

HAMILTON & ACHESON, *Att'ys for Pl'ff.*

And afterwards, to wit, May 5th, 1865, comes the defendant, by his attorneys, and files the following demurrer to pl'ff's replication:

Copy of demurrer.

In the circuit court of the United States, west. dist. of Penna.

WILLIAM PICKERSGILL, for use of Levi Wade, citizens of Pennsylvania,
vs.
FREDERICK PRENTICE, a citizen of the State of New York, and Wm. H. White, a citizen of Michigan.

And the said Frederick Prentice saith that the said replication of the said Wm. Pickersgill, pl'ff, to the said eleventh plea of said Prentice, defendant, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said Pickersgill, pl'ff, to have or maintain his aforesaid action thereof against him, the said Prentice, defendant, and that he, the said Prentice, defendant, is not bound by the law of the land to answer the same; and this he, the said Prentice, defendant, is ready to verify.

18

Wherefore, for want of sufficient replication in this behalf, he, the said Prentice, defendant, prays judgment if the said Pickersgill, plaintiff, ought to have or maintain his aforesaid action thereof against him, &c.

And the said Prentice, defendant, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer in law to the said replication: that is to say, that the said replication does not legally nor properly traverse the allegations in said plea; "that it was mutually agreed between the said plaintiff and the said defendants that they, the said plaintiff and said defendant, would leave it to William Henry to say and decide how much, if anything, should be paid by the said Prentice

to the said plaintiff in full satisfaction and discharge of the covenants and undertakings in said plea mentioned, and that said replication does not properly and legally traverse the allegations in said plea; that the said William Henry, in pursuance of said agree-
19 ment, did then and there, in the day and year in said plea mentioned, and at the district in said plea mentioned, say and decide that the said defendant should pay to the said plaintiff fifteen hundred dollars more, in satisfaction and discharge of the covenants and undertakings in the same plea mentioned; that the said replication is no answer to the matter in the said eleventh plea of the said defendant above pleaded; that the same is colorable, uncertain, and insufficient in law, and that said replication introduces new matter in the allegation; that the said defendant did not pay to the said plaintiff the sum of fifteen hundred dollars, or any sum of money, for or on account of any award or determination;" which allegation ought to have concluded with a verification, (not to the country,) so that the said defendant should have an opportunity of answering to that new matter; and also for that the said replication is in other respects uncertain, informal, and insufficient, &c.

LOOMIS & WOODWARD, *Att'ys for Prentice.*

And now, to wit, May 11th, 1865, the demurrer of def't to the pl'ff's replication to the 11th plea came on to be heard and
20 was argued by counsel, and the court being fully advised in the premises, do overrule the demurrer.

And the parties now being at issue, a jury being called, come, viz: Samuel Garrison, James Kennedy, John Vandegrift, John Halfpenny, D. J. Cathcart, James Cotton, Thomas Millen, Samuel Young, David Craig, Reuben Grove, John Mawer, and Isaac Grier, twelve good and lawful men, who having been summoned, returned, balloted for, impanelled, and sworn, (or affirmed,) do say they find for the plaintiff the sum of two thousand six hundred and eighteen $\frac{41}{100}$ dollars and costs of suit.

And afterwards, to wit, May 16th, 1865, judgment is hereby entered upon the verdict for the sum of two thousand six hundred and eighteen $\frac{40}{100}$ dollars, and forty-five dollars costs taxed.

H. SPROUL, *Clerk.*

And afterwards, to wit, May 18th, 1865, on motion of defendants' attorney, in open court, it is ordered that a writ of error and citation issue upon condition of defendant giving bail (to be approved by the court) in the sum of five thousand dollars to prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make good his writ of error aforesaid.

By the court. H. SPROUL, *Clerk.*

21 And afterwards, to wit, May 19th, 1865, the bond of Samuel M. Kier is presented to the court and approved; the following writ of error and citation was issued and served, and service accepted by the counsel of the plaintiff, (see indorsement on writ and citation.)

H. SPROUL, *Clerk C. C. U. S., W. D. of Pa.*

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Pennsylvania:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William Pickersgill, jr., for the use of said Levi Wade, citizens of the State of Pennsylvania, plaintiff, ond Frederick Prentice, a citizen of the State of New York, impleaded with William H. White, a citizen of the State of Michigan, defendants, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears; we, therefore, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washton on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court, at Washington city, may correct that error, and do what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States at Pittsburg, this 19th day May, A. D. 1865.

H. SPROUL, *Clerk.*

23 I, Wilson McCandless, one of the judges of the circuit court of the United States for the western district of Pennsylvania, in the third circuit, having approved the bond of Samuel M. Kier as surety for Frederick Prentice, do allow this writ of error.

WILSON McCANDLESS, *U. S. Judge.*

Service accepted May 19, 1865.

HAMILTON & ACHESON,
Att'ys for Pl'ff below.

24 UNITED STATES OF AMERICA, *Western district of Penn'a sct:*

[SEAL.] The President of the United States to the marshal of the western district of Pennsylvania, greeting:

Whereas Frederick Prentice, a citizen of the State of New York, impleaded with Wm. H. White, a citizen of the State of Michigan, has this day sued out a writ of error to a certain judgment in a certain action of covenant recovered against him on the 16th day of May, A. D. 1865, in the circuit court of the United States in and for the western district of Penn'a, in the third circuit, by William Pickersgill, jr., for the use of Levi Wade, citizens of the State of Pennsylvania, No. 9 of May term, 1865:

These are, therefore, to command you that you make known to the said William Pickersgill, jr., and Levi Wade, that they be and appear to the said writ of error in the Supreme Court of the United States, at Washington city, D. C., being the seat of the national government, on the first day of the next term thereof, being the first Monday of December, A. D. 1865 ; and herein fail not at your peril.

And how you shall have executed this writ of citation, make return to our clerk of our said court for the western district of Pennsylvania, at Pittsburg, on the rule day of said court for the month of June next.

Witness the honorable Salmon P. Chase, this 19th day of May, A. D. 1865.

H. SPROUL, *Clerk.*

25 Service accepted May 19, 1865.

HAMILTON & ACHESON,
Att'ys for Pl'ff below.

26 UNITED STATES OF AMERICA, *Western district of Pennsyl'a, ss:*

I, Henry Sproul, clerk of the circuit court of the United States for the western district of Pennsylvania, do hereby certify that the foregoing is a true exemplification of the record and proceeding in the foregoing case, as full and complete as the same remains on file and of record in this court.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court this day of May, A. D. 1865, and of the independence of the United States the eighty-ninth.

[SEAL.] H. SPROUL, *Clerk.*

Filed November 29, 1865.

*

IN THE

Supreme Court of the United St

ERROR TO THE CIRCUIT COURT OF THE UNI STATES IN AND FOR THE WESTERN DISTRIC OF PENNSYLVANIA.

FREDERICK PRENTICE, *Plaintiff in Error,*

versus

WILLIAM PICKERSGILL, JR., *Defendant in Error.*

BRIEF AND ARGUMENT ON PART OF DEFENDAN IN ERROR.

GEO. P. HAMILTON, Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FREDERICK PRENTICE, *a Citizen of the State of New York, who was impleaded with* WILLIAM H. WHITE, *a Citizen of the State of Michigan, Plaintiff in Error.*

versus

WILLIAM PICKERSGILL, JR., *a Citizen of the State of Pennsylvania, Defendant in Error.*

BRIEF AND ARGUMENT ON PART OF DEFENDNAT IN ERROR.

This was an action of covenant brought by William Pickersgill, Jr., Plaintiff below, against Frederick Prentice and William H. White, (as to the latter of whom the Marshal returned *N. E. I.*) upon the following article of agreement.

Whereas, William Pickersgill, Jr., has purchased from Frederick Prentice the north-east quarter of section 21, in Lake Township, Wood County, and State of Ohio, containing one hundred and sixty acres of land,

And Whereas, The said Pickersgill has paid to the said Prentice the sum of $3,200 for the said land in fee-simple,

And Whereas, There is a mortgage of $5,000 or thereabouts unpaid against the lands, of which this is a portion,

And Whereas, The intention of said Prentice was to give to said Pickersgill a full, clear and perfect title to said one hundred ane sixty acres of land,

And Whereas, William H. White, of the city of Pittsburgh, County of Allegheny, and State of Pennsylvania urged the said Pickersgill to purchase the said land at the aforesaid price, and said White would, with said Prentice, bind himself andagree to sign a paper guaranteeing a perfect and clear title to said Pickersgill of the said lands.

Now this Agreement Witnesseth, That for and in consideration of the sum of one dollar in hand paid to us by the said Pickersgill, the receipt whereof we do hereby acknowledge, we do bind ourselves, agree and guarantee to the said Pickersgill, that the mortgage aforesaid shall be fully paid off within eighteen months from this date, and that the property shall not be sold upon the said mortgage nor upon any judgment obtained thereon, nor upon any lien given or to be given by the said Prentice, but that the said Pickersgill shall have a full, clear and perfect title in fee-simple to the said lands. To the full performance of which we bind ourselves to said Pickersgill in the sum of $3,200, as liquidated damages.

Witness our hands and seals, this 27th day of September, A. D., 1858.

F. PRENTICE, [*Seal.*]
WM. H. WHITE. [*Seal.*]

WITNESS.
J. B. SACKETT.

The Plaintiff's declaration averred, and the evidence in the cause established, that the mortgage recited in the foregoing instrument of writing, was not paid off within eighteen months from the date of the instrument, but, to the contrary thereof, judgment was obtained thereon, and on the 4th day of June, 1860, the said lands were sold on said judgment, and thereby the title of the said Pickersgill was wholly defeated.

The Defendant filed eleven special pleas, and issue being joined thereon, the cause was tried on its merits before Mr. Justice Grier, at May Term, 1865, of the Circuit Court of the United States, for the Western District of Pennsylvania.

The Defendant had paid to the Plaintiff below $1,500 on account of his claim. This payment was admitted, and the Defendant below received credit therefor. In point of fact he had no other or further defense, and there was a verdict for the Plaintiff on the 10th day of May, 1865, for $2,618 41.

May 15, 1865, judgment in favor of the Plaintiff below on the verdict.

The 11th Plea of the Defendant below was as follows:

"And for further plea in his behalf, the said Prentice, Defendant, saith that the aforesaid Plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said Prentice having paid the said Plaintiff one thousand five hundred dollars, at sundry times, as he claimed, and supposed, and understood, in full satisfaction and discharge of the said several covenants and undertakings in the said Plaintiff's declaration mentioned, a dispute and controversy arose between the said Prentice and the said Plaintiff, whether anything more was due or coming from the said Prentice, Defendant, to the said Plaintiff for or by reason of the covenants and undertakings in the said declaration mentioned; and it was mutually agreed between the said Prentice and the said Plaintiff, to wit: On the 1st day of January, 1864, to wit, at the District aforesaid, that they would leave it to William Henry, the partner of the said Pickersgill, Plaintiff, to say and decide how much, if anything, should be paid by the said Prentice to the said Plaintiff, in full satisfaction and discharge of the covenants and undertakings aforesaid; and that the said William Henry in pursuance of such agreement, did, then and there, to wit, on the day and year last aforesaid, at the District aforesaid, say and decide that said Prentice should pay to the said Plaintiff $1,500 more in satisfaction and discharge of said covenants and undertakings, which sum of $1,500, he, the said Prentice, then and there, on the day and year last aforesaid, and at the District aforesaid, offered to pay to the said Plaintiff, in satisfaction and discharge of said covenants and undertakings which the said William Henry so decided as aforesaid, should be paid by said

Prentice to the said Plaintiff. And this the said Prentice is ready to verify, wherefore he prays judgment, &c."

To the above plea the Plaintiff below filed the following

REPLICATION.

"And the said Plaintiff, as to the plea of the said Defendant (11th Plea) above pleaded, saith that the matters in controversy between the said Plaintiff and Defendant in the said action were not referred or submitted to the determination or decision of the said William Henry; and the said William Henry did not make an award or decision in relation thereto; and that the said Defendant did not pay to the said Plaintiff the sum of $1,500, or any sum of money for or on account of any award or determination made or declared by the said William Henry; and of this the plaintiff puts himself upon the country"

On the 28th of April, 1865, the cause was set down, *sec. reg.*, for trial at the May Term, the Clerk having first entered a formal joinder of issue, under Rule No. 93, viz.: "No cause shall be placed upon this list unless the same be actually at issue, or an issuable plea be put in, in which case issue may be joined by the clerk."

After the cause was thus set down for trial, to wit, on the 5th day of May, 1865, the Defendant below filed a demurrer to the above replication; but, after argument, Mr. Justice Grier overruled the demurrer, and the jury were sworn, and the cause tried upon its merits.

The Defendant utterly failed to prove any reference or submission whatsoever to the said William Henry, or any award made by him.

ARGUMENT.

The above replication (discarding verbiage) was a substantial answer to the Defendant's 11th plea.

The averment in the replication that the Defendant did not pay the sum of $1,500, or any sum on account of any award or

determination made by William Henry, was at most immaterial and mere matter of surplusage. Independently of that averment the replication was a complete answer to the plea.

Moreover, the demurrer was too late. It was filed after issue joined, and when the cause was on the trial list and ready for trial.

The case was tried before the jury upon its merits, and the defendant below utterly failed to make out any defense to the Plaintiff's claim. The Plaintiff had credited him with the $1,500, and the verdict was for the residue. In point of fact, the Defendant below had no defense, and his demurrer, like his Writ of Error, was intended for delay.

Jas. Vecchi GEORGE P. HAMILTON,

Attorney for Defendant in Error.